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IN THE

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, *et al.*,
Petitioners,

v.

DUKE ENERGY CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT DUKE ENERGY CORPORATION

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] WLF devotes substantial resources to defending and promoting economic liberty, free enterprise principles, and a limited and accountable government.

To that end, WLF has appeared before this and lower federal courts in cases raising important constitutional and statutory questions regarding the scope and lawfulness of an agency's regulatory and enforcement authority. *See, e.g.*, *United States v. Rapanos*, 126 Sup. Ct. 2208 (2006); *Whitman v. Am. Trucking Assn's, Inc.*, 531 U.S. 457 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). In addition, WLF's Legal Studies Division publishes legal policy papers on these topics and sponsors related education programs and briefings.

This case raises important issues under the Clean Air Act regarding the authority of the federal district courts to adjudicate defenses to the Environmental Protection Agency (EPA)'s enforcement actions, where, as here, the targeted company is not challenging the validity of the underlying rule, but the validity of the Agency's interpretation and application of the rule. WLF believes that as a matter of law, fundamental fairness, and sound public policy, district courts should not be precluded from adjudicating the merits of these defenses.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of this brief. Letters of consent by the parties to the filing of this brief are on file with the Office of the Clerk.

WLF's brief will focus on this jurisdictional issue and its broader implications, although *amicus* agrees with Duke Energy Corporation ("Duke Energy") that the lower courts properly decided the merits in its favor.

INTRODUCTION AND STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* adopts the Statement of the Case as presented by Duke Energy. In brief, in 1999, the Environmental Protection Agency (EPA) launched an enforcement action against Duke Energy (as well as many other utilities) in district court under the Clean Air Act, claiming that its coal-fired power plants violated the EPA's 1980 Prevention of Significant Deterioration (PSD) Rule. Petitioners Environmental Defense, *et al.*, intervened.[2]

Duke Energy defended itself by arguing that the EPA's newfound litigation position interpreting the 1980 PSD Rule was contrary to the plain language of the statute, the rule itself, and EPA's contemporaneous interpretation of the 1980 Rule. The district court agreed with Duke Energy, the court of appeals affirmed, and this Court granted review.

Petitioners argue here that the lower courts were precluded from adjudicating the merits of Duke Energy's defense because it allegedly constituted judicial review of the 1980 PSD Rule itself, and that under Section 307(b)'s judicial review provisions of the Clean Air Act, such review lies exclusively with the U.S. Court of Appeals for the

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[2] Though the United States is nominally a Respondent in this Court, *amicus*' reference to Petitioners in this brief should be understood to include the United States and the EPA collectively unless otherwise noted.

District of Columbia Circuit. *See* 42 U.S.C. § 7607(b)(1).

Petitioners alternatively argue that even if the lower courts could adjudicate Duke Energy's defense to the EPA's enforcement action, they wrongly decided the merits of the case. As noted, *amicus* will focus its brief on the jurisdictional question presented in this case.

SUMMARY OF ARGUMENT

When Congress enacted the judicial review provisions of the Clean Air Act, it specified that certain EPA final rules, air quality standards, and similar final agency actions would be judicially reviewable only in the U.S. Court of Appeals for the District of Columbia Circuit upon a filing of a petition for review within 60 days after the publication of the rule, regulation, standard, or other final action in the *Federal Register*. *See* 42 U.S.C. § 7607(b). In doing so, Congress surely did not intend that a regulated entity subject to a subsequent civil or criminal enforcement action brought by the EPA to enforce one of its rules in a district court would be precluded from raising as a valid defense that the agency's litigation position misinterprets or misapplies its otherwise valid regulation.

Indeed, Congress made it clear in § 307(b)(2) that only "action" by the EPA Administrator that could have otherwise been subject to judicial review in the D.C. Circuit under § 307(b)(1) (namely, final rules, standards, and similar "final action") is not reviewable in civil or criminal enforcement actions. Because the agency's multiple and shifting *interpretations* of a regulation in an enforcement action is *not* final agency action, and thus, could not have been raised by filing a petition for review, by necessary implication, Congress did not foreclose the normal

adjudication of the issue either in the district court or subsequently on appeal.

In the instant case, Duke Energy is not challenging the validity of the 1980 PSD Rule itself. Rather, both courts below had jurisdiction to adjudicate Duke Energy's defense that the EPA's litigation position as to the meaning or interpretation of its 1980 PSD Rule was legally unsound. To hold otherwise would unfairly bar Duke Energy from interposing a valid defense to an agency enforcement action, and raise serious constitutional questions regarding the availability of judicial review by preventing courts from carrying out their duty to say what the law is.

Finally, reading § 307(b) to preclude Duke Energy's defense to an enforcement action would not serve the overall purpose and structure of the judicial review provisions of the Clean Air Act -- uniformity and administrative efficiency. It would instead allow the EPA to make ad hoc regulations in the guise of enforcement actions to suit its needs.

ARGUMENT

I. SECTION 307(B)(2) OF THE CLEAN AIR ACT SHOULD NOT BE READ TO PRECLUDE THE ADJUDICATION OF DUKE ENERGY'S CHALLENGE TO EPA'S NEWFOUND INTERPRETATION OF THE 1980 PSD RULE

Over the last 25 years, the EPA has at times advanced several distinct interpretations of its 1980 PSD Rule that were inconsistent with the meaning it adopted at

the time of the rule's promulgation.[3] In addition to its shifting re-interpretations over time, EPA has also claimed in a recent rulemaking that identical language in the 1980 PSD Rule is to be applied differently to electric utilities and non-electric utilities.[4] Under this ad hoc interpretation of the 1980 PSD Rule, the single "major modification" definition mandates an "actual-to-potential" test for all existing non-electric utility sources, but only an "actual-to-projected-actual" test for existing electric utility sources. Yet in 1992, EPA disavowed the "actual-to-potential" interpretation. *See* 57 Fed. Reg. 32,314, 32,317 (July 21, 1992).

Petitioners argue nevertheless that the lower courts lacked jurisdiction to adjudicate Duke Energy's defense in this civil enforcement action because § 307(b)(2) states that "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. § 7607(b)(2). That argument lacks merit and should be rejected. Otherwise, the EPA will assert authority to reinterpret its regulations to suit its needs,

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[3] *Compare United States v. Duke Energy Corp.*, 278 F.Supp. 2d 619, 641 (M.D.N.C. 2003) (noting immediately after the promulgation of the PSD regulations in 1980, EPA announced that "the requirements of PSD would be implicated only by an increase in the hourly rate of emissions") *with Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 915-17 (7th Cir. 1990) *and* United States Br. at 20 (claiming that "[t]he only reasonable construction of the PSD regulations is that a physical change that increases a source's hours of operation is a 'modification.'").

[4] *See* 67 Fed. Reg. 80,186, 80,199 (Dec. 31, 2002). Yet the Clean Air Act defines "construction" and "modification" the same for all stationary sources and does not differentiate between electric and non-electric utilities.

and insulate any challenge to the lawfulness of its new interpretation by bringing costly enforcement actions based on its flawed interpretation.

Section 307(b)(2) bars judicial review in an enforcement action only with respect to "action" by the EPA Administrator that "could have been obtained" in a prior judicial review proceeding in the D.C. Circuit. Such pre-enforcement challenges to EPA final rules, standards, or regulations brought within the statutory 60-day period from their publication in the *Federal Register* are necessarily facial challenges. *Cf. INS v. Nat'l Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991) ("That the regulation may be invalid in [some] cases . . . does not mean that the regulation is facially invalid . . . ."). This is so because the agency will rarely have applied the rule to a sufficient number of situations as to have fully explicated the rule's meaning.

However, this does not affect the court's duty to determine the lawfulness of an agency's multiple interpretations of a regulation in the context of a specific enforcement action. In such a case, there simply is no "final action" taken that could be subject to "judicial review" under § 307(b)(1). Rather, the promulgated regulation remains intact and can be applied in future cases even though a district court can declare its application in a particular case before it to be unlawful. Thus, when EPA interpreted the 1980 PSD Rule in such a way as to bring Duke Energy's projects into question, it opened the door for the company to raise a defense that the EPA's interpretation was wrong.

The plain language of § 307(b) does not prevent district courts which otherwise have jurisdiction to hear a

dispute to "say what the law is,"[5] *i.e.*, to determine the proper interpretation of all statutes and regulations before them. Even if the court in an appropriate case defers to the agency when more than one meaning is possible, it is still the court that is expounding the law. The legislative history of § 307 further buttresses this proposition. According to the Senate Committee Report, a regulated entity such as Duke Energy "would not be precluded from seeking such review at the time of enforcement insofar as the subject matter applied to him alone." S. Rep. 91-1196, at 41 (1970). *See also Utah Power & Light Co. v. EPA*, 553 F.2d 215, 218 (D.C. Cir. 1977) (noting distinction between challenge to regulation and challenge to agency application or interpretation of regulation for purposes of seeking judicial review).

Duke Energy's argument that the 1980 PSD Rule's definition of "major modification" includes a "modification" within the meaning of the NSPS program is a legitimate challenge to EPA's *interpretation* or application of its 1980 PSD Rule, and therefore presents a question of law suitable for resolution in an enforcement action brought by the agency. It does not turn on the validity of the agency's reasoning in an administrative proceeding or the sufficiency of any administrative record. As such, when the court below determined that EPA's litigation interpretation would conflict with the Clean Air Act's plain language and must be rejected, the Fourth Circuit was operating well within its authority to decide if the agency's interpretation of its regulation was legally sound and would be applied to this case.

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[5] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

II. CONGRESS ENACTED SECTION 307(b) WITH THE UNDERSTANDING THAT IT HAD EXPANSIVE BUT NOT UNLIMITED POWER TO CONTROL THE JURISDICTION OF THE LOWER FEDERAL COURTS

Section 307(b)'s language should not be read to suggest that the courts below were precluded from reaching the merits of Duke Energy's defense. To do so would raise a difficult constitutional question: Can Congress place within the federal court's jurisdiction responsibility to decide a civil judicial enforcement action, but refuse to permit that same court to determine whether the agency's interpretation of the dispositive regulation in the case is lawful? As a matter of constitutional avoidance, this Court should construe § 307(b), as it has in other contexts, to mean that Congress did not intend "to place courts in [the] untenable position" of entering judgment based on an unreviewable executive action. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 430 (1995).

Our constitutional structure gives Congress broad authority under Article III to control the jurisdiction of both the lower federal courts and the Supreme Court. As this Court stated in *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448-49 (1850):

> Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all. The Constitution has defined the limits of the

> judicial power of the United States, but has not prescribed how much of it shall be exercised by the [lower federal court]; consequently, the statute which does prescribed the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.

See also Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("The Congressional power to ordain and establish inferior courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.") (internal quotations omitted).

But while Congress's authority to control the jurisdiction of the federal courts is broad, certain types of restrictions on the exercise of the judicial power are so antithetical to our constitutional structure that they will not be permitted. For example, Congress cannot commandeer the federal courts to exercise their judicial power in a way that makes the courts nothing but a cipher for legislative action. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872) (refusing to permit Congress to "prescribe rules of decision to the Judicial Department of the government in cases pending before it"). Congress likewise cannot revise the absolutely final judgment of an Article III tribunal. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). Some courts have asserted that Congress may not prevent all judicial tribunals from litigating constitutional claims. *See Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948) ("[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the

Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.").

Finally, judicial independence is threatened when Congress vests a federal court with the jurisdiction and duty to decide a particular type of case as it did here, but then refuses to permit the court to review the Executive's determination of the key issue necessary to the proper resolution of that case. This Court's decision in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), is particularly instructive on this point.

In *Gutierrez*, this Court considered the reviewability of a determination by the Attorney General under the Westfall Act that a government agent was acting within the scope of his employment. When a federal employee is sued for a negligent act, the Westfall Act permits the Attorney General to certify that the employee was acting within the scope of his employment at the time the claim arose. This certification causes the United States to be substituted for the employee as defendant in the suit. The action then proceeds under the terms of the Federal Tort Claims Act, which includes a limitation against waiving the United States government's sovereign immunity for torts occurring outside the United States' borders.

The facts in *Gutierrez de Martinez* concerned just such a situation. In *Gutierrez*, a federal agent injured several persons in a car accident in Colombia, and the injured persons brought suit against the agent in federal district court. The United States Attorney for that district certified that the employee was acting within the scope of his duties at the time of the crash, causing the United States

to be substituted as defendant. Upon certification, the district court determined that it lacked jurisdiction of the action and dismissed the suit, rejecting plaintiff's arguments that the certification was reviewable.

In holding that the Attorney General's certification was reviewable, the Court noted the "surreal" situation presented by precluding judicial review. "The key question presented—scope of employment—however contestable in fact, would receive no judicial audience. The Court could do no more, and no less, than convert the executive's scarcely disinterested decision into a court judgment." *Id.* at 429. As a result, the Court stated that while Congress may establish compensation schemes that operate without judicial participation, it will not presume that Congress intended "a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate." *Id.* at 430 (citing *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872)).

Accordingly, this Court should reject the Petitioners' argument that § 307(b) should be read to preclude the adjudication of Duke Energy's defense in the courts below.

III. PRECLUDING DUKE ENERGY'S CHALLENGE TO EPA'S LITIGATION INTERPRETATION OF THE 1980 PSD RULE WOULD FRUSTRATE CONGRESS'S PURPOSES IN ENACTING § 307(B)

Congress imposes restrictions on judicial review when compelling reasons exist for doing so. Here, Congress designed § 307(b) to serve two compelling purposes. First, it ensures that EPA final rules, standards, and similar final action under the Clean Air Act are "uniformly applied and

interpreted." S. Rep. 91-1196, at 40 (1970). Second, it ensures that EPA regulations and other final actions are "quickly reviewed by a single court intimately familiar with administrative procedures." *Id.* Section 307(b) was never intended to shield the agency from being challenged for its unlawful and unjustified enforcement actions.

A. Precluding Review of EPA's Litigation Position Does Not Serve Purposes of Uniformity

Congress enacted § 307(b) in part to ensure that agency action is uniformly applied and interpreted. Where the EPA provides multiple and inconsistent interpretations of its rules, or applies identical statutory language differently depending on the type of regulated entity or the area in which it is located, this purpose is not served. EPA's enforcement action against Duke Energy is precisely such a case.

Although not often acknowledged, Congress tacitly assumes that when EPA and other administrative agencies exercise their delegated power to fill the gaps in statutory schemes that Congress left unfilled, the agency presumably will make the necessary policy choices and create a coherent and predictable regulatory scheme that explains to covered entities their obligations and liability. This Court should not permit the agency to promulgate regulations and then feel free years later to apply differing interpretations of these regulations without judicial review. Precluding the district court and Fourth Circuit from reviewing EPA's latest interpretation of the 1980 PSD Rule would do just that, thereby rewarding EPA for disregarding the plain language of both the statute and the 1980 PSD Rule.

B. Precluding Review of EPA's Litigation Position Does Not Serve Purposes of Expediency

Congress's other purpose in enacting Clean Air Act § 307(b) was to ensure that EPA's rules, standards, and final action are quickly reviewed by a single court intimately familiar with administrative procedures to settle any doubt about the validity of those actions. These purposes, however, are not served by precluding review of EPA's litigation interpretation of the 1980 PSD Rule.

As an initial matter, any argument suggesting Congress's preference for review in a court intimately familiar with administrative procedure (such as the D.C. Circuit) overreaches inasmuch as § 307(b)(1) does not discriminate among challenges that should have been filed in the D.C. Circuit and challenges that should have been filed in the regional circuits (which, presumably, are not as "intimately" familiar with administrative procedures).

Here, it is the EPA, not Duke Energy, that has impeded both the uniform and expeditious review of agency action by abruptly changing its contemporaneous interpretation of the 1980 PSD Rule many years later when it launched unexpected and unfair enforcement actions against Duke Energy and many other energy companies. Moreover, adjudicating Duke Energy's defense challenge would not entail an examination of administrative procedural defects, *i.e.*, the sufficiency of the record, whether the agency followed internal rules in the rulemaking process, or adequately explained its reasons for departing from the rule, all of which is the typical procedure that follows the filing of a petition for review of an EPA rule or standard. Rather, Duke Energy simply questions EPA's litigation position in

light of the plain language of the statute and regulation.

C. Precluding Review of EPA's Litigation Position Interpreting the 1980 PSD Rule Would Create Adverse Consequences That Congress Did Not Intend

As discussed, precluding review of Duke Energy's challenge to EPA's litigation interpretation of the 1980 PSD Rule would not serve any of Congress's intended purposes in enacting the rule. Moreover, it would have negative consequences for administrative and regulatory governance. In providing for an effective forum for pre-enforcement judicial review, Congress surely did not intend to induce the regulate community to file preemptive legal challenges to newly promulgated rules based upon how an agency might interpret or apply those rules sometime in the future. Such defensive petitions for review would needlessly proliferate lest the regulated entities fear being confronted with an enforcement action in which their defense would be precluded by the crabbed reading of § 307(b) that Petitioners advance. Indeed, a major purpose behind all statutes that provide for judicial review -- the conservation of judicial and litigation resources -- would not be served by adopting EPA's position.

The judicial review provisions of § 307(b) were designed to provide expedited review of the validity of the rule or final action in question, and to preclude their subsequent challenge years later in an enforcement action. But where, as here, the EPA has developed several inconsistent interpretations over the years of the meaning of its 1980 PSD Rule, Congress did not expect a regulated entity to file petitions for review in the D.C. Circuit. Such petitions would most assuredly be dismissed on the grounds

that there was no final action subject for review, or as unripe. Rather, because Congress provided district courts with the jurisdiction to adjudicate EPA enforcement actions, review of EPA's enforcement interpretation of the 1980 PSD Rule in those courts should not be precluded by § 307(b).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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INTEREST OF THE AMICI CURIAE[1]

Amici, current and former members of Congress who served on the committees that drafted the 1977 Clean Air Act ("CAA") Amendments establishing the Prevention of Significant Deterioration ("PSD") program, urge the Court to rule in favor of Petitioners and reject the Fourth Circuit's flawed reading of the statutory term "modification" as it applies to the PSD program. The Fourth Circuit's interpretation of that term would contravene Congress's intent as reflected in the statutory language and legislative history. As drafters, amici have a strong interest in ensuring that the letter and intent of the statute are interpreted correctly.

Henry A. Waxman serves as Congressman from California's 30th District, and has done so since 1974. Edward J. Markey serves as Congressman from Massachusetts' 7th District, and has done so since 1976. Fred Rooney served as Congressman from Pennsylvania's 11th District from 1967 to 1978. Andrew Maguire served as Congressman from New Jersey's 7th District from 1974 to 1980. Richard Ottinger served as Congressman from New York's 26th District from 1965 to 1971, its 25th District Congressman from 1975 to 1983, and its 20th District Congressman from 1983 to 1985. Anthony J. Moffett served as Congressman from Connecticut's 6th District from 1974 to 1982. Wendell Anderson served as Senator from Minnesota from 1976 to 1978. Each of the amici were

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[1] Amici state that no counsel for a party authored any part of this brief, and no person or entity other than Amici or their counsel and counsels' employers made a monetary contribution to the preparation or submission of this brief. The parties to the case have consented to the filing of this brief.

on the Senate's Environment and Public Works Committee and the House of Representatives' Interstate and Foreign Commerce Committee, respectively, during the passage of the Clean Air Act's 1977 amendments.

INTRODUCTION

In this Clean Air Act (CAA) case, the Fourth Circuit held that the Environmental Protection Agency's (EPA) "actual annual emissions" test for measuring emissions increases under the "Prevention of Significant Deterioration" (PSD) program was unlawful because it was not identical to the test EPA uses for its New Source Performance Program (NSPS). *United States v. Duke Energy Corp.*, 411 F.3d 539, 547 (4th Cir. 2005). Noting that the NSPS regulations utilize a maximum hourly emissions rate test, the Fourth Circuit concluded that EPA must also use this test to determine whether PSD applies to plant renovations such as those made to plants owned by Respondent Duke Energy. *See id.* at 550 ("EPA promulgated NSPS regulations that define the term 'modification' so that only a project that increases a plant's *hourly* rate of emissions constitutes a 'modification'. . . . EPA must, therefore, interpret its PSD regulations defining 'modification' congruently") (emphasis in original). Unlike the actual annual emissions test supported by EPA, the Fourth Circuit's hourly test would ignore emission increases caused by increased hours of operation made possible by renovations. Thus, if this ruling is allowed to stand, air pollution sources such as the aging coal-fired plants managed by Respondent could undertake renovations that increase the actual amount of emissions they produce

many times over without triggering PSD review. Such an approach to PSD applicability would do little or nothing to prevent significant deterioration of air quality – indeed, it would practically assure such deterioration. Amici, as legislators responsible for drafting the CAA Amendments of 1977, recognize that such a result would be inconsistent with the language and purpose of those provisions of the statute, as well as the statute's larger goal of controlling air pollution, and thus ask the Court to reverse the Fourth Circuit's decision.

ARGUMENT

I. The Actual Annual Emissions Increase Test in EPA's PSD Regulations Gives Effect to Congress's Unambiguous Intent to Determine PSD Applicability Based on the Actual Emissions Increase Resulting from a Physical or Operational Change.

A. The Plain Statutory Language Defines "Modification" in Terms of Whether a Change Will Increase Actual Emissions.

In crafting the CAA's Prevention of Significant Deterioration (PSD) requirements, Congress intended to guard against those changes to a stationary source that would increase the source's actual annual emissions. Accordingly, the interpretation offered by the industry respondents and the Fourth Circuit, which relies upon stationary source capacity – i.e., hourly emissions rates – rather than actual

annual emissions as required by EPA's PSD regulations,[2] contravenes Congress's unambiguous intent. *Cf. Chevron, USA, Inc. v. Natural Res. Defense Council*, 467 U.S. 837, 843 (1984) (rejecting even an agency interpretation when it contravenes Congress's unambiguous intent).

The CAA defines a regulated "modification" subject to PSD review as any physical or operational change in a stationary source which "increases the *amount* of any air pollutant *emitted* by such source[.]" 42 U.S.C. §§ 7411(a), 7949(2)(C) (emphasis added). This language unambiguously demonstrates Congress's intent for PSD applicability to turn on whether a change will increase actual emissions. *See New York v. Envtl. Prot. Agency*, 413 F.3d 3, 40 (D.C. Cir. 2005) ("*New York I*") ("[T]he plain language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions instead of potential or allowable emissions."); *New York v. Envtl. Prot. Agency*, 443 F.3d 880, 889 (D.C. Cir. 2006) ("To the extent industry intervenors rely on the NSPS regime to reargue their position that 'modifications' require an increase in maximum emission rates, that issue was resolved in *New York I*."); *Alabama Power Co. v. Costle*, 636 F.2d 323, 353 (D.C. Cir. 1980) ("Plainly, the pollutants that sources 'emit' is a reference to some measure of *actual* emissions") (emphasis added); *id.* at 353 (rejecting an EPA interpretation of "potential to emit" that would make "the actual emissions

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[2] Compare the 1980 PSD Regulations, 45 Fed. Reg. 52,675, 52,714 (Aug. 7, 1980) (40 C.F.R. § 51.166(b)(2), (3), (21) (1987) (measuring "actual emissions" in terms of "tons per year") with the NSPS regulations referred to by the industry respondents, 40 C.F.R. § 60.14(b) (1987) (targeting "emissions rates" as measured in kilograms per hour).